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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1309

MARYLAND PUBLIC INTEREST RESEARCH GROUP,
Petitioner,

v.

WILSON H. ELKINS ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS B. BURCH,
Attorney General,
STEVEN P. RESNICK,
Assistant Attorney General,
1400 ONe South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Respondents.

The Daily Record Co., Baltimore, Md. 21202

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit (Pet. App. 22a) reversing the District Court's decision (Pet. App. 1a) is reported at 565 F.2d 864 (1977). The District Court's decision is reported at 430 F. Supp. 387 (1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the University was not required by the strictures of the First Amendment to fund the litigation activities of student organizations.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is adequately set forth in the Petition.

STATEMENT OF THE CASE

At the outset it must be noted that Petitioner's articulation of the "Question Presented" is not the question presented by this case. The Maryland Public Interest Research Group is *not* required to forego litigation *as a condition of receiving its share of student activity funds.* (Pet. 2). Petitioner was granted significant appropriations from University funds upon the condition that it "not use any of the funds *so appropriated* to pay litigation expenses." (Pet. App. 3a). (Emphasis added). Petitioner's misleading and inconsistent statement of the issue presented[1] belies its

[1] On pages 2-9 of its Petition MaryPIRG articulates the issue in an overbroad and contradictory manner. On page 2 it contends that its staff attorneys will be forced to forego litigation *as a condition* of receiving its funds; on p. 3 it similarly states that the Regents imposed that condition upon the organization's receipt of its shares of those funds, and on page 6 it contends that the Court of Appeals has permitted the Regents to utilize "economic pressure as a means of requiring MaryPIRG to forego litigation — an activity protected by the First Amendment." Apparently uncomfortable with those articulations, Petitioner states that the Court of Appeals held that the "First Amendment did not require the Regents to finance any activity of which they disapproved," and the issue presented "therefore, is whether a University's decision not to finance a protected activity is entirely immune from constitutional scrutiny solely because the activity is abridged through a refusal to finance rather than through an absolute prohibition." *See* n.3, *infra.*

refusal to recognize and address the constitutional principles pertinent to the facts of this case: MaryPIRG may freely litigate against any party, including the University, without losing its student activity fee appropriations. The only "condition" involved in this case is the University's decision that it will not fund the litigation activities of its student organizations.

The Maryland Public Interest Research group became a recognized student organization in February, 1974, eligible to receive appropriations from student activities fees subject to the approval of the University's Board of Regents. During that academic year Petitioner received an allocation of $25,437. For the academic year 1975 the organization received $38,619. Such funds, accorded to MaryPIRG "to advocate the public interest in areas of concern to students enrolled in the College Park Campus," (Pet. App. 3a) were the second largest and the largest appropriations awarded to student organizations in those two years, respectively. One limitation was placed upon the University's award — MaryPIRG could not use those University funds to conduct litigation. No student organization has ever been awarded activity fee allocations for this purpose. (Pet. App. 17a). "With no factual dispute before him, the District Judge summarily upheld MaryPIRG's claimed First Amendment grievances and enjoined enforcement of the litigation exclusion apparently relying on *Perry v. Sindermann,* 408 U.S. 593 (1972)." (Pet. App. 24a). The Court of Appeals reversed that judgment holding that the University was not constitutionally compelled "to finance the Plaintiff's assertion of the Amendment." (Pet. App. 26a).

Petitioner's request for rehearing and rehearing *en banc* were rejected and the present Petition was filed with this Court.

REASON FOR DENYING THE WRIT,

THE COURT OF APPEALS PROPERLY HELD THAT THE UNIVERSITY'S REFUSAL TO FUND THE LITIGATION OF A RECOGNIZED STUDENT ORGANIZATION DID NOT CONSTITUTE AN "UNCONSTITUTIONAL CONDITION" ABRIDGING PETITIONER'S FIRST AMENDMENT RIGHTS.

Recent decisions of this Court have made clear that a State's refusal to fund constitutionally protected activities does not amount to a penalty upon an individual's exercise of such rights. *Maher v. Roe,* 432 U.S. 464 (1977); *Cammarano v. United States,* 358 U.S. 498 (1959); *Cf. San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). In seeking a Writ of Certiorari Petitioner has neither acknowledged this principle nor addressed this authority.

Instead MaryPIRG seeks to bring this case within the ambit of *Perry v. Sindermann,* 408 U.S. 593 (1972), and 16 "prior unconstitutional condition decisions" of this Court (Pet. 7). Unlike those cases, this Petition does not involve any State regulation which conditions the award of State benefits, to which MaryPIRG would otherwise be entitled, upon the organization's agreement to relinquish the exercise of its constitutional rights. There is no *quid pro quo* through which the State may seek to limit the spectrum of permissible private conduct.

In *Maher* this Court distinguished the cases upon which Petitioner relies precisely upon this ground holding that Connecticut's decision not to fund elective abortions should not be subjected to "strict scrutiny" under the Equal Protection Clause of the Fourteenth Amendment. After reviewing its earlier authority in *Shapiro v. Thompson,* 394 U.S. 618 (1969) and *Sherbert v. Verner,* 374 U.S. 398 (1963), both cited in *Perry, id.* at 597 and relied upon by Petitioner, (Pet. 7), as well as *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), this Court held:

> "If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that states would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.
>
> Sherbert v. Verner, 374 U.S. 398 . . . (1963), similarly is inapplicable here." 432 U.S. at 474-75 n.8.

Petitioner is not being denied University funds because it engages in a constitutionally protected activity; it is "simply being required to pay for those activities entirely out of . . . [its] own pocket(s)." *Cammarano, supra,* at 512-13.[2] *Maher* and *Cammarano* make clear that the First Amendment does not "require the Regents to finance any activity of which they" disapprove (Pet. 4).

Petitioner's assertion that under the decision below "governmental officials could do anything from censoring campus newspapers, to prohibiting welfare recipients from suing the welfare department," (Pet. 8-9) is unfathomable. The ruling in no way implicates the question of whether such officials could withhold government funds on the basis of the content of an individual's speech nor does it sanction any condition

[2] Petitioner's reliance upon Speiser v. Randall, 357 U.S. 513 (1958) at p. 7 ignores the express rejection of the applicability of that case under circumstances similar to those presented here in Cammarano at 512-513.

imposed upon the receipt of state benefits requiring an individual to relinquish his right of access to the courts. Unable to demonstrate that the Court of Appeals "has modified the unconstitutional condition doctrine so radically that it can no longer adequately guard against the abuses that it was developed to prevent," (Pet. 9) Petitioner asserts that the record will not support that judgment. In this attack Petitioner cannot prevail.

In reaching its decision the District Court concluded that the University's limitation upon the use of its funds abridged the Petitioner's First Amendment rights and that the University was, therefore, required to demonstrate a compelling State interest for that restriction narrowly drawn so as to entail the least possible instrusion upon MaryPIRG's protected activities. (Pet. App. 8a-9a). This is the argument advanced by MaryPIRG in its Petition (Pet. 7). The Court of Appeals reversed that judgment holding that the First Amendment was not implicated by the University's refusal to finance MaryPIRG's litigation. Although no general due process claim was raised by Petitioner at trial or on appeal,[3] the Court nevertheless considered numerous rational bases advanced by the University in its brief in support of its decision to maintain this limitation upon

[3] In its complaint Petitioner alleged that the "litigation restriction" was imposed in retaliation for its prior litigation which proved embarrassing to the University. The complaint further alleged the violation of the organization's procedural due process rights. Notwithstanding Petitioner's admission and the District Court's finding that "its fourteenth amendment due process and equal protection claims are not presently ripe for summary judgment," (Pet. App. 5a) MaryPIRG has attempted to color its argument by infusing such allegations on p. 5, n.2 of its Petition. The issue is not, therefore, whether the University is "entirely immune" in its funding decisions — the allegations of the Regents' retaliatory motivation in imposing the "litigation restriction" and the supposed denial of MaryPIRG's procedural due process rights await trial in the District Court.

the use of its funds.[4] Such justifications are clearly sufficient to sustain the University's action. Cf. *Bishop v. Wood*, 426 U.S. 341, 349-50, (1976); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

CONCLUSION

For these reasons the Respondents urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,
STEVEN P. RESNICK,
Assistant Attorney General,
1400 ONe South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Respondents.

[4] The Court of Appeals apparently found one such ground — that the use of such funds to promote litigation might reasonably be deemed by the Regents to force students not in accord with MaryPIRG's aims to finance beliefs to which they were opposed — compelling. (Pet. App. 27a). *Compare* Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977); International Association of Machinists v. Street, 367 U.S. 740 (1961); Lathrop v. Donohue, 367 U.S. 820 (1961).